Supreme Court, U.S.
FILED
99 530 SEP 23 1999
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

C & C BUILDING CO., INC.,
C.J. CHARNAS, and J.C. CHARNAS,
Petitioners,

v.

STATE OF MICHIGAN, DEPARTMENT OF
CONSUMER AND INDUSTRY AFFAIRS,
BUREAU OF OCCUPATIONAL AND
PROFESSIONAL REGULATION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF MICHIGAN

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the State of Michigan violated Petitioners' due process rights by applying unconstitutionally vague pseudo-standards to find violations under 1980 P.A. 299 The Michigan Occupational Code, MCL 339.2411(1)(2)(m); in place of the statutory standard mandated by 1972 P.A. 203, The State Construction Code, MCL 125(1504), MSA 5.2949(4) Novi Ordinance 7-16 and AC R. RULE 51 R. 338.1551(5).

2. Whether the State of Michigan's prosecution of the builder based on the building code enforcement official's determination of the standards for workmanship violations under 1980 P.A. 299 MCL 339.2411(m) is an improper exercise of the police power and an impermissible delegation of authority to an administrative official.

3. Whether the state of Michigan violated petitioners' due process and equal protection rights by prosecuting him under 1980 P.A. 339. 2411(m) which has no mens rea provision.

4. Whether the State of Michigan violated Petitioners' due process rights by its decision in the Declaratory Judgment action.

PARTIES TO THE PROCEEDING

PETITIONERS

Costa J. Charnas, John C. Charnas and C&C Building Co. Inc., a Michigan corporation. The corporate entity, C&C Building Co. Inc., is a one man corporation and has no parent companies or wholly or partly owned subsidiaries.

RESPONDENTS

The State of Michigan, Department of Consumer & Industry Services, (at the inception of this prosecution called the Department of Commerce Bureau of Occupational and Professional Regulation. (Herein BOPR.)

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PETITION FOR A WRIT OF CERTIORARI

C&C Building Co. Inc., Costa J. Charnas and John C. Charnas, respectfully petition for a writ of certiorari to review the judgement of the Michigan Supreme Court in this case denying a petition for review of this case.

OPINIONS BELOW

The Opinions and Orders below are unreported.

JURISDICTION

The Michigan Supreme Court entered its judgment on April 27, 1999 (App A) and denied the petitioners' petition for rehearing on June 29, 1999. (App D). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This petition involves the Fifth Amendment of the Constitution of the United States, which provides:

> **Criminal Actions - Provisions concerning - Due process of law and just compensation clauses.**
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual services in time of War or public danger; nor shall any person be subject for the same

> offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

This petition also involves the Fourteenth Amendment of the Constitution of the United States, Section 1, which provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATE STATUTES INVOLVED

The State of Michigan adopted the Boca Code as the standard to regulate residential building in the State. 1972 P.A. 230 State Construction Code, MCL 125.1501, et seq., MSA 5.2949(1) et seq. The City of Novi has adopted said Boca Code as the standard for regulating residential building. Novi Ordinance #7-16.

1980 P.A. 299, The Michigan Occupational Code, MCL 339.2411(1)(2); MSA 18.425 (2411)(1)(2) provides that for a period of 18 months after the home is occupied, the buyers may file a Complaint and lists a number of violations that may be alleged. The Complaint must be verified by a building inspector and the inspector is required to cite specific Boca Code sections for each alleged violation listed on the Verification Report.

> Section 24(1) "A Complaint filed as prescribed in article 5 shall be made within 18 months after completion, occupancy, or purchase, whichever occurs later, of a residential structure or a combination of a residential and commercial structure.
>
> Sec.(m) Poor workmanship or workmanship not meeting the standards or custom or trade verified by a building enforcement official."

Michigan Administrative Regulation 1979 AC R Rule 51 388.1551(5) states that Complaints made pursuant to 1980 P.A. 299 §2411(1)(2)(m) must be judged by the standard of the local building code. In Novi, the local building code is the Boca Code. Novi Ordinance 7-16.

> AC R. 338. 1551(5) Complaints; filing
>
> Rule 51 (5) "Standards of construction shall be in accordance with the local building code, or in the absence of a code, in accordance with the building code of the nearest political subdivision having a building code."

STATEMENT

The local building code in Novi is the Boca Code. The standards referred to in AC R 1551(5) Rule 51 (5) must be the substantive sections of the Boca Code. The State substituted a vague heading in an introductory chapter of 1987 Boca Code, §116.0, to cite and prosecute Petitioner arbitrarily. The facts leading up to this intolerable situation are as follows:

On or about April 18, 1990, Costa J. Charnas, a licensed builder, obtained a permit to build a spec home (a home built by the builder with his own funds on his own property and not specifically for any buyer) on Lot 19, 41429 Reindeer Drive, Novi, Michigan 48375. John C. Charnas, his son and a licensed builder, worked under the direction of Costa J. Charnas and was subordinate to him.

Upon completion of the home builder received a Permanent Certificate of Occupancy. Buyers Speredoula and Brian Swanson, inspected the home several times prior to purchase, and purchased it for the highly discounted price of $228,000.00 dollars. In 1997, Novi's assessed valuation of the home for tax purposes was about $240,000.00 dollars.

During the eighteen month period following occupancy, the buyers requested and received service for normal conditions affecting new construction, but also for requests that were not legitimate. Builder complied with these requests mostly on Saturdays and Sundays, to accommodate the buyer's schedule.

As the end of the eighteen month period approached, however, Swansons filed a complaint pursuant to P.A. 209

1980 Michigan Occupational Code, MCL 339. 2411(1)(2)(m); MSA 18.425(2411)(1)(2)(m); with the Department of Commerce, Bureau of Professional Regulation (herein BOPR) listing a myriad of cosmetic and maintenance conditions that allegedly needed correction, many false, and many already serviced. Many of the conditions alleged, including the three not dismissed in the contested case hearing, would have been ascertainable upon reasonable inspection prior to purchase, had they in fact existed, and so excluded from contract warranty. *Hardy v Stoppel*, 162 Mich. 676, 127 N.W. 703 (1910) and *U.S. v Lembke*, 786 F.2d 1386 (9th Cir. 1986).

The same inspector, Gerry McCallum, who inspected the home during construction, made a verification report, listing twenty minor cosmetic and maintenance items, many false, many serviced.[1] The Report form requires the inspector to cite specific Boca Code violations, but there were none, so he substituted a mere vague heading in an introductory chapter of the Boca Code: Boca §116.0, to cite builder. The inspector did not allege violation of any manufacturer's standards or trade standards. In fact, there were none. From 1993 to the present, Builder and his attorney have contacted many agencies including the Michigan Attorney General's Office regarding the false allegations to no avail. Due to the failure of the Attorney General's Office to respond timely, evidence of perjury and malicious prosecution is being lost.[2]

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[1] Petitioner suspects the report is padded to make it difficult to defend against and to create a false impression that the builder's work must be generally shoddy and deserving of conviction.

[2] A driveway at 22251 Antler Drive, falsely reported in 1991, to be heavily pitted and five slabs in need of replacement in

On August 3, 1993, Builder filed his Answer to the Complaint. Builder first raised the issues in this Writ in his Answer as Affirmative Defenses; to wit:

1. AC R. RULE 51 R. 338.1551(5) mandates that substantive sections of the Boca Code are the standard that must be applied to judge Complaints under 1980 P.A. 299 §2411(m).

2. 1987 Boca Code §116.0 is a vague pseudo-standard, that does not provide sufficient notice of the conditions that constitute violations. (R. Ans. p. 25)

3. The misuse of the vague pseudo-standard Boca §116.0 resulted in abuse of power, arbitrary, discretionary and ultra-vires regulation in builder's case.[3] (R. Ans. p. 25)

During this period, a series of settlement conferences was scheduled by the BOPR during which Swansons delayed the settlement by making demands such a price reduction because a church was located in back of their home. It was there long before they purchased the home.

Because the Bureau has no authority to decide the Constitutional issues, on or about March 28, 1994, builder

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August, 1999, is beginning to show slight signs of wear.

[3] Mike Van Der Tuck's (an agent for the BOPR) told builder's attorney in telephone conversation at the time of the Complaint, not to bother to come up here (for a contested case) because the "Bureau always takes the word of the inspector as final".(R. Ans. p. 26)

filed a Complaint for Declaratory Judgment in Oakland County Circuit Court. He reiterated the issues first stated as Affirmative Defenses in the Answer to the Complaint: That 1987 Boca Code §116.0 was unconstitutionally vague; that 1980 P.A. 299 §2411(m) must be read in conjunction with AC R RULE 51 R. 338.1551(5); and the failure to apply the standard mandated by AC R RULE 51 R. 338.1551(5), the substantive sections of the Boca Code, resulted in an ultra vires, arbitrary and capricious prosecution of builders by the State, and an impermissible delegation of legislative authority to a building code enforcement official. (Declar. Judg. Brief 5/17/94, pp. 9, 12,)

The Circuit Court stated that "regarding the vagueness of 1980 P.A. 299 §2411(m), the issue presented is whether the phrase "nonworkmanship" as a means of regulating builders is unconstitutionally vague." Builder never used the phrase "nonworkmanship" and it is not used in 1980 P.A. 299 §2411(m). The Circuit Court found "that the standard articulated in the statute" provides fair warning of conduct proscribed. It appears that the Court was referring to 1980 P.A. 299 §2411(m) as the "articulated standard", but it is not clear. *1980 P.A. 299 §2411(m) is a mere allegation, it is not a standard.*

The Circuit Court applied the "facts at hand" standard, *Chapman v United States*, 500 U.S. 453, 111 S.Ct. 1855, 75 L.Ed. 2d 524 (1991) but failed to understand a key fact: that the statutory standard is the substantive sections of the Boca Code. (Circuit Ct. Trans. 6/15/94, Builders' Complaint for Declar. Jdgmt., 5/17/94 pp. 8-10) (App. H)

In September, 1994, builder appealed the Circuit Court ruling to the Michigan Court of Appeals. The

Michigan Court of Appeals affirmed the Circuit Courts decision. That court applied a "facts at hand standard" to the vagueness issues because no First Amendment issues were involved. *Chapman v U.S., supra*. However, the Court of Appeals failed to recognize the key fact in this case: namely, that there is an express statutory that must be applied in judging builder's workmanship pursuant to Complaints under 1980 P.A. 299 §2411(m) and that standard is the Boca Code. AC R RULE 51 R. 338.1551(5), meaning substantive sections of the Boca Code, not the vague 1987 Boca Code §116.0, cited by the inspector.

The court declared that when the inspector described the allegations in detail on his report, Petitioners had fair notice of what constitutes "poor workmanship". (App. G). Petitioner maintains that The "Verification Report" is nothing more than a witness statement, made to "verify" conditions alleged by home owners filing Complaints. The Court failed to recognize that the notice must come in the law and thus, the decision directly conflicts with *Grayned v City of Rockford,* 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed 2d 22 (1972).

Builder, discouraged by said Court of Appeals decision, decided it was futile to appeal any further. He agreed to settle the case and a settlement was hammered out by Jeannette Eiserman, a legal analyst for the BOPR. The buyers accepted $1,700.00 in settlement and withdrew their Complaint. Ms. Eiserman, an experienced legal analyst, then recommended to Andrew Metcalf, Director of Legal Services, that the BOPR close the case.

The BOPR refused to drop the case. The State failed to apply AC R Rule 51 Sec. 1551.(1) in its decision to prosecute after settlement. That rule says that "Failure or

refusal by the licensee to correct a *structural matter that is materially deficient, dangerous or hazardous* to the owners shall be presumed to be dishonest or unfair dealing." Additionally, 1969 P.A. 306 The Michigan Administrative Procedures Act, MCL 24.292, MSA 3.560(192) §92 (MAPA) says the licensee shall be given the opportunity to show compliance with all *lawful* requirements for retention of the license."

> This means that the license cannot be revoked (and by extension penalties imposed) if the licensee can show either (1) compliance with requirements imposed by the licensing authority; or (2) the requirements with which he has not complied are illegal. Bienefield (Michigan Administrative Law Sec. 7-12 (1987 ICLE).

The fact that the Complaint was settled to the satisfaction of the homeowners, *under the direction of the BOPR,* shows that the builder complied with all requirement imposed by the licensing authority. Not one of the conditions alleged could be characterized as even remotely dangerous, hazardous or materially deficient structural matters. Nevertheless the State continued its unjustifiable prosecution. On February 14, 1996, prior to the Contested Case hearing, Builder filed a Motion for Summary Disposition under MCR 2.116 (C)(7). Builder raised essentially the same issues that he had raised in the Declaratory Judgment; that the standard for Complaints under 1980 PA 299(m) is *substantive* sections of the Boca Code, not Boca 116.0. (R. Brf. Motion Sum. Disp.)

The Prosecution made the ludicrous argument that three allegations were "substantive" thus warranting continued prosecution: namely, #7 and #9, and a soffit vent allegedly "hanging from a nail".[4] The soffitt vent was only slightly dented and the builder had replaced it long before the complaint was filed. Builder argued that: (1) the Complaint was based on minor cosmetic items and thus did not warrant continued prosecution; (2) that prior payment of $1,700.00 for cosmetic repairs to two slabs in the Swansons' driveway; and (3) compliance, evidenced by settlement of the Complaint are grounds for Summary Disposition under MCR 2.116(C)(7). The State of Michigan failed to state a claim on which relief can be granted, since they failed to follow the correct standard for judging Complaints under 1980 P.A. 299 (2411)(m) and substituted a pseudo-standard of Boca §116.0. The settlement was evidence that all fact issues had been resolved so dismissal was also appropriate under MCR 2.116(10). Builder's Motion for Summary Disposition was erroneously denied.

A contested case ensued in the BOPR, Hearings Division, held on Friday, September 27, 1996. Stephen B. Goldstein presided. (herein ALJ)

Inspector McCallum testified that he cited the builder on own personal opinion rather than any written law, and that the Allegations were cosmetic in nature. He admitted that

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[4] At the hearing, Builder put a soffit vent into evidence, which sells for 3@.75 cents retail. (Tr. 9/27/96 p. 71-75) to illustrate the trivial nature of the allegation.

there are no written guidelines for regulation of cosmetic and maintenance items. [5] (App. A , Hrg. Rep. p. 11)

> Judge Goldstein: "Are these your subjective standards, Inspector?
> A. "In this instance, yes, for this one, yes."
> (Tr. 9/27/96 Hg. p. 65, 1-17)

But the fact that he did not cite specific code sections shows that he used his subjective standards in every instance.

> Q. "But you make the decision as to whether you think the item should be repaired or not?"
> A. "Yes, I do."
> Q. "And you use your discretion...."
> A. "Yes, I do."
> (Tr. 9/27/96 Hg. p. 95, 20-25)

His use of subjective standards constitute an unacceptable arbitrary utra vires prosecution of builder. Inspector McCallum' s false and confused testimony, such as claiming there were no control joints in the garage, when in fact, there are several, leads builder to suspect that the

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[5] (R. Trans. 9/27/96 Hrg. p. 35, 22; p. 38, 19-25; p. 64, 7-16; p. 65, 10-16; p. 24, 13-18; p. 32, 12-25; p. 42, 14-18; p. 54, 20-22; p. 56 4-6; p. 62, 15-25; p. 63 20-25; p. 64, 7-26; p. 65, 1-17; p. 91, 1-20; p. 92 1-6; p. 95, 20-26.)

inspector did not inspect the home but made the report by talking to the homeowner.[6]

The builder testified that he addressed all the allegations on the report.

> Q. "And so you addressed every item that was on Mr. McCallum's complaint, wasn't that correct?"
> A. "That is correct."
> (R. Tr. 9/27/96 Hg. p. 127, 14-20)

Builder submitted into evidence standards of workmanship published by a home warranty insurer, and by the National Association of Homebuilders, which showed, that builder surpassed nationally recognized trade standards. (Ex. A, B, Tr. 9/27/96 p. 125, 11-25; p. 126, 1-25)

Builder reiterated the arguments made in the Declaratory Judgment action and the Motion for Summary Disposition. (Tr. 9/27/96 Hg. pp. 135-145)

The ALJ failed to apply the express statutory standard for judging complaints under 1980 P.A. 299 §2411(m), stated in 1979 AC R Rule 51 §338.1551(5), namely the Boca Code, and, instead, applied a vague pseudo-standard he minted for the occasion, " *generally accepted workmanship standards of*

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[6] A prosecutor for the BOPR told Petitioners' Attorney, within ALJ Stephen B. Goldstein presence, that it is "not uncommon" for the inspectors to testify without personal knowledge of the items that they cite on their "Verification" Report. This violates the most basic rule of evidence, that a witness have personal knowledge MRE 602.

the industry" to find that builders violated 1980 P.A. 299 §2411(m) of the Occupational Code with respect to Allegations 7, an allegedly crooked trim board on the back of the Tudor style home; 9 an alleged gap in the mortar at the front northwest corner of the home; and 11, an alleged 3/4" area at the bottom of the interior window trim on a bedroom window which was not flush to the wall because the ALJ said that the builder failed to "explain or excuse them". (App. F)

The builder testified with respect to Allegation 7:

> "....Can you recall any other items that you did for the Swansons?"
>
> A. "I fixed the trim board *over the back bay*, and replaced the soffit vent."
>
> (Tr. P 127 l. 6-9)

With respect to Allegation 9, the builder testified:

> Q. "....What about No. 9, 'gap at southwest corner of structure where brick meets foundation wall', did you take care of that?"
>
> A. "Yes, I did."
>
> Q. "....Did you do this before or after you were reported?"
>
> A. "We did it....actually we learned about it after, so we couldn't have done it before."

Further, the State, without any evidence, erroneously found that it was "undisputed" that Petitioner, operating as C&C Building Co. Inc., entered into a contract *for the construction of a new residential dwelling* with Brian and

Speredoula Swanson. The Michigan Court of Appeals also stated erroneously that "Pursuant to a contract, plaintiffs (builders) constructed a home...." falsely implying that the home was constructed *for* Swansons. The contract in fact, was a sales contract for a completed spec house, not a construction contract regulated by the Occupational Code. The State failed to understand that their regulation of Petitioners' contract warranty is limited to substantive Boca Code violations. It is fundamentally unfair to arbitrarily enforce Petitioner's obligations under his sales contract, and in fact go beyond those obligations, as the State did in the instant case, as part of their regulatory scheme, while eliminating the buyer's obligations under that contract. The contract is properly enforced in an action on the contract which is governed by the doctrine of mutuality and other contract principles. As Petitioners' testimony and Exhibits show, he provided service under his contract warranty, beyond what was required.

On December 10, 1996, The Residential Builders and Maintenance and Alteration Contractors Board issued two identical final orders, one to John C. Charnas and one to Costa J. Charnas and assessed a fine of $500.00 dollars to each, and issued a letter of censure to each without distinguishing between the two. (App. E)

Only the builder, Costa J.Charnas, who applied for and obtained the building permit should even have been charged, although the State had no legal basis for charging either builder.

Neither the Board, nor the ALJ ever inspect the home. The BOPR relies completely on the report and testimony of the Inspector, as Mike Van Der Tuck stated.

The Verification Report was padded with twenty some conditions, many false and many previously serviced. Builder had to testify regarding each allegation, and so, could not spend a great deal of time on each allegation. Even so, he explained Allegations 7, 9 and 11 to the same extent that he explained the ones dismissed.

Builder filed a Motion for Reconsideration in other to further explain the service he had provided with regard to Allegations 7, 9 and 11.

The ALJ abused his discretion in denying builder's Motion for Reconsideration, since builder devoted the motion to a detailed explanation of how Allegation 7 and 9 were false, to wit: The trim on the back bay was not crooked as alleged. The buyers wanted *additional* trim but did not make this known prior to purchase. The *amount* of trim was an ascertainable condition prior to purchase and excluded from warranty under *Hardy v Stoppel*, *supra*, and *U.S. v Lembke*, *supra*. About 18 months after closing the buyers of this spec home, complained that trim "should have been" placed above the bay. Builder, under duress because of the false prosecution, added trim at no extra cost, thus exceeding his contractual and statutory duties.

Allegation 9 was also completely false. The photo submitted at the Motion for Summary Disposition shows that there is no concrete foundation. The brick meets the ground and there is no gap at the southwest corner of the home, (lower left corner in photo of front of home). Swansons complaint was that there was "not enough mortar between the bricks,"another ascertainable condition, had it existed, and a false, ludicrous allegation. Builder had the bricklayer add mortar to placate Swansons, again exceeding contract.

Allegation 11 was minor and corrected to the satisfaction of the owners as were 7 and 9. Builder quoted passages from the trial transcript to show that he had "explained" Allegations 7, 9 and 11 in the Motion for Reconsideration.

On or about May 6, 1997, Builders appealed to Oakland County Circuit Court which found the contested case hearing legally correct, and erroneously affirmed the Board's decision. (App. C) The Application for Leave to Appeal was erroneously denied by the Michigan Court of Appeals on the grounds of no merit. (App. B) Builders then filed a Petition for Review in The Michigan Supreme Court which was denied on April 27,1999, on the grounds that the questions builder presented were not appropriate for review. (App. A) The builder filed a Motion for Reconsideration which was denied on June 29, 1999 on the grounds that the Court could find no error in denying the initial petition. (App D) The Michigan Supreme Court failed to recognize that the questions presented involve Petitioners' due process rights and thus are appropriate for review.

REASONS FOR GRANTING THE WRIT

I. THE STATE OF MICHIGAN VIOLATED PETITIONERS DUE PROCESS RIGHTS BY APPLYING UNCONSTITUTIONALLY VAGUE PSEUDO-STANDARDS TO FIND VIOLATIONS UNDER 1980 P.A. 299 MCL 339.2411(M) IN PLACE OF THE STATUTORY STANDARD MANDATED BY THE STATE CONSTRUCTION CODE, MCL 125(1504), MSA 5.2949(4), NOVI-ORDINANCE 7-16 AND AC R. RULE 51 R. 338.1551(5)

A. STATE IGNORES STATUTORY STANDARD STATED IN AC R. RULE 51 R. 338.1551(5)

The basic error that all the lower courts made is that they ignored AC R. Rule 51 R. 338.1551(5) to rule that a workmanship violation alleged under 1980 P.A. 299 §2411(m) allows the inspector to determine the standards for finding a workmanship violation.

The fact is that 1980 P.A. 299 §2411(m) is a mere allegation in a Complaint made pursuant to 1980 P.A. 299 §2411(1)(2). The courts fail to read 1980 P.A. 299 §2411(m) in conjunction with AC R RULE 51 R. 338.1551(5) and so they fail to understand that there is an express statutory standard that the inspector is required to use to judge the builder's workmanship. That standard is the substantive standards of the Boca Code. The standard can not be the mere heading which the inspector cite: 1987 Boca Code §116.0. They fail to understand that the inspector is a mere witness for the State and his "Verification Report" is a mere witness statement. They fail to understand that 1980 P.A. 299 §2411(1)(2) was enacted to create a window period of eighteen months following occupancy in which a buyer can report substantive Boca Code violations. It is absurd to rule that the inspector can use 1980 P.A. 299 §2411(m) and Boca 116.0, 116.1 to cite conditions that are not Boca Code violations, but which he would like to cite, based on his or the owner's predilections.

B. BOCA COMMENTARY SAYS BOCA 116.0 IS VAGUE STATEMENT OF INTENT

The Boca National Building Code 1993 COMMENTARY, Volume 1, pp. 1-13 , authored by Boca Code officials to explain the Boca Code section by section, supports Petitioners' contention that Boca 116.0 is not an ascertainable standard. It is only a statement of intent and "should be regarded and used solely in this manner".

The COMMENTARY states that Boca 116.1 is difficult to enforce since it does not provide workmanship criteria for all conditions. As a statement of intent it can be effectively cited with a specific referenced standard, code text or manufacturer's installation.

No referenced standard, code text or manufacturer's installation were ever cited in connection with the citations to Boca 116.0 in this case. No such standards were violated.

> "A statutory definition which declares what a statute "means" excludes any meaning which is not stated." *Colautti v Franklin*, 439 U.S. 979, 99 S. Ct. 675, 58 L. Ed. 2d 596 (1979) n10 2 AC Sands, Statutes and Statutory Construction §47.07 4th ed Supp. (1978)

The "meaning" of the words "local building code" in AC R. RULE 51 R. 338.1551(5) is clear. The local building code in Novi is the Boca Code. This has to mean specific regulations, not mere statements of intent such as 1987 Boca Code §116.0 is. Although in some instances the State Construction Code permits the use of other building codes to

regulate builders, the name of the building code must be written on the building permit. If, as in the instant case, no other code appears on the permit, the builder is regulated under the Boca Code by default.

Yet the ALJ not only sanctioned the inspector's use of Boca 116.0 to find a workmanship violation under 1980 P.A. 299 MCL 339.2411(m), the ALJ also added his own invented substitute standard, an unconstitutionally vague standard, "*generally accepted industry standards*" to find a violation of (m). He substituted "*generally accepted industry standards*" (his term) for the standard required by the State Construction Code, and AC R RULE 51 338.1551(5) for judging Complaints under 1980 P.A. 299 § 2411(m). If Michigan law allowed the ALJ to use "generally accepted industry standards", which it doesn't, the evidence clearly showed that Petitioners exceeded such trade standards and thus all charges should have been dismissed, even under this pseudo-standard. (Petitioners' Exhibits A, B at Hearing)

The ALJ as well as the appellate courts fail to recognize that the legislature's expressly stated standard precludes the application of all other standards. Thus the Builder was erroneously charged and found guilty, despite the fact that he had complied with the law.

Petitioners' fundamental property rights in his license, *Board of Regents v Roth*, 408 U.S. 594, 92 S.Ct. 2701, 33 L. Ed. 2d 548 (1972), and his liberty interests in practicing an occupation, *Barry v Barchi*, 443 U.S. 55, 99 S. Ct. 266421, 61 L. Ed. 2d 365 (1979), are endangered by the State's arbitrary application of these pseudo-standards invented by judges and building code enforcement officials. When fundamental rights are involved, laws and their application or

mis-application, as the case is here, require a stricter scrutiny, probably an intermediate standard, not as high as First Amendment rights, but not as cursory as those applied to mere economic concerns. *Smith v Goguen*, 415 U.S. at 578, 94 S.Ct. at 1249, 39 L. Ed. 2d 605 (1974) Nowak & Rotunda, Constitutional Law (4th ed.), Sec. 16.9, pp. 950-951).

C. THE STATE'S APPLICATION OF VAGUE PSEUDO-STANDARDS CONFLICTS WITH GRAYNED V ROCKFORD, KOLENDAR V LAWSON, AND THEIR PROGENY

The state's invented standards, Boca 116.0, 116.1; 1980 P.A. 299 §2411(m); and "*generally accepted industry standards*"; fail the Three-part U.S. Supreme Court vagueness test.

1. **NO NOTICE**: Neither 1987 Boca §116.0, 116.1, nor 1980 P.A. 299 §2411(m) cited alone as in the instant case, nor "*generally accepted industry standards* the provide clear notice of what conduct is proscribed.

The Michigan Court of Appeals grievously erred in stating in their opinion *that when the building inspector listed an allegation on his Verification Report, that was sufficient notice to Builder that he had violated the law.*

The notice must come in the law itself. The "Verification Report" is nothing more than a witness statement.

> "First we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning." *Grayned v City of Rockford, supra.*

To say that a mere list of allegations is fair notice that Petitioner violated a law, as the Michigan Court of Appeals did, is to sanction arbitrary law enforcement. If the State's ruling, that Petitioner has fair notice of a violation when he receives the Complaint and Verification Report from the State, is left to stand, Petitioner will find it impossible to plan his conduct in order to refrain from violations. As in the instant case, the State may prosecute him for conditions he would not expect to be prosecuted for; for conditions that trade practice says is the maintenance responsibility of the owner; for conditions such as normally occur in new construction; or conditions excluded from warranty under law, because they are ascertainable by reasonable inspection prior to purchase. *Hardy v Stoppel, supra., U.S. v Lembke, supra.*

2. **NO CLEAR GUIDELINES**: They must provide clear guidelines for law enforcement.

> "Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policeman, judges, and juries for discriminatory

application." *Grayned v City of Rockford, supra.*

Neither 1987 Boca 116.0, 116.1 nor 1980 P.A. 299 §2411(m), nor *"generally accepted industry standards"*, provide explicit guidelines to inspector and the BOPR. The inspector admitted that there were no written guidelines for the cosmetic and maintenance items he cited. He also admitted using his subjective standards to cite builder. Thus the prosecution violated the most important aspect of the vagueness doctrine, the stricture against arbitrary prosecution.

3. **NOT SPECIFIC**: Neither 1987 Boca 116.0, 116.1 nor 1980 P.A. 299 §2411(m), nor *"generally accepted industry standards"*, are stated with narrow specificity.

> "The absence of any ascertainable standard for inclusion and exclusion is precisely what offends the due process clause."
> *Smith v Goguen, supra*

The specific guidelines are in the substantive sections of the Boca Code. The builder met those standards as the fact that he was never cited for violations of substantive Boca Code sections shows.

II. WHETHER THE STATE OF MICHIGAN'S PROSECUTION OF THE BUILDER BASED ON THE BUILDING CODE ENFORCEMENT OFFICIAL'S DETERMINATION OF THE STANDARDS FOR WORKMANSHIP VIOLATIONS UNDER 1980 P.A. 299 MCL 339.2411(m) IS AN IMPROPER EXERCISE OF THE POLICE POWER AND AN IMPERMISSIBLE

DELEGATION OF AUTHORITY TO AN ADMINISTRATIVE OFFICIAL

The Boca Code §100.4 specifically states that the code only regulates construction as it relates to health and safety. Not one of the items cited by the inspector are health and safety violations under the Boca Code. *Ypsilanti v Rose Bldg. Co.*, 112 Mich App 64, 315 NW 2d 196 (1981) says that the local building authorities cannot go beyond the State Construction Code.

Boca 116.0, 116.1 and 1980 P.A. 299 §2411(m), used alone without reference to and proof of a substantive Boca Code violation, as the inspector admitted doing, are unconstitutionally vague as applied to builder, in violation of the most important aspect of the vagueness doctrine, that a . . . law must not permit policemen, prosecutors and juries to. . . pursue their personal predilections. *Grayned v City of Rockford, supra.*

III. 1980 P.A. 339. 2411(m) HAS NO MENS REA PROVISION WHILE 1980 P.A. 339. 2411(e) DOES

1980 P.A. 339.2411(m) has no mens rea provision, while 1980 P.A. 339.2411(e) does have a mens rea provision, making it possible to prosecute two similarly situated builders for exactly the same alleged violation pursuant to 1980 P.A. 299 §2411(1)(2) under either section. The strict liability standard under §(m) but not under §(e) results in disparate treatment of Petitioners in violation of the equal protection principles of the United States Constitution Amendment V and XIV. Prosecuting under §(m) eliminates the requirement to prove intent. The ALJ characterized the contested case hearing as a "quasi-criminal" procedure. Therefore the lack

a mens rea requirement renders 1980 P.A. 299 §2411(m) void or vagueness on that basis alone. This issue was first raised in Petitioners' Rebuttal Brief to the State. (Builder's Petition for Review Oakland County Circuit Court, Builders' Rebuttal, 6/23/1997, p. 2)

IV. THE DECLARATORY JUDGEMENT ACTION DOES NOT PRECLUDE GRANTING OF THE WRIT BECAUSE ABUSE OF POWER IS ALWAYS SUBJECT TO REVIEW

These issues were first raised in Petitioners' Supplemental Brief Two, 6/23/97. The issues are not res judicata. When the wrong standard is applied, the injustice that results must be corrected. *Commissioner of Internal Revenue Service v Sunnen,* 333 U.S. 591, 599, 68 S.Ct. 715, 92 L.Ed. 898 (1948). Abuse of power is always subject to review. *Long v City of Highland Park,* 329 Mich. 146, 45 NW 2d 10 (1950). Federal courts will negate res judicata when state courts are unwilling or unable to protect the plaintiff's federal rights, as in the instant case. *Knurbe v Sparrow*, 808 F. Supp 1295 (E.D. Mich. 1992)

The courts of appeal should not be allowed to sanction the bureau's use of invented pseudo-standards to arbitrarily prosecute Petitioner, by refusing leave to appeal. The Michigan Supreme Court, by refusing to consider the questions of whether the BOPR substituted invented pseudo-standards for the statutory standard mandated by AC R. Rule 51 R.338.1551(5); and whether prosecuting petitioner under these invented pseudo-standards, was an improper exercise of the police power and an impermissible delegation of authority to an administrative official; affirmed the denial of a fair trial and due process.

CONCLUSION

For all the reasons stated in this Petition, the Writ of Certiorari should be granted

Respectfully submitted,

/s/_____
Eileen Charnas (Mi P35076)
Attorney for Petitioners
22674 Ennishore Drive
Novi, Michigan 48375
(248) 348-9663

APPENDIX A

MICHIGAN SUPREME COURT
LANSING, MICHIGAN

[filed April 27, 1999]

Elizabeth A. Weaver,
Chief Justice

James H. Brickley
Michael F. Cavanagh
Marilyn Kelly
Clifford W. Taylor
Maura D. Corrigan
Robert P. Young, Jr.,
Justices

C&C BUILDING CO, INC, C.J. CHARNAS, and J.C. CHARNAS, Plaintiffs-Appellants,	)	
v.	)	SC: 112920
	)	COA: 209060
	)	Oakland CC:
	)	97-541257-AA
STATE OF MICHIGAN, DEPARTMENT OF CONSUMER AND INDUSTRY AFFAIRS, BUREAU OF	)	

OCCUPATIONAL AND)
PROFESSIONAL REGULATION,)
Defendant-Appellee.)
_____)

On order of the Court, the application for leave to appeal from the August 5, 1998, decision of the Court of Appeals, is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

f0420

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

April 27, 1999

/s/ _____
Corbin R. Davis
Clerk

APPENDIX B

COURT OF APPEALS
STATE OF MICHIGAN

[filed August 5, 1998]

ORDER

Richard A. Bandstra
Presiding Judge

David H. Sawyer
Gary R. McDonald

C & C Building Company, Inc.	)
	)
v.	) Docket No.209060
	) LC No.97-541257
State of Michigan	)
	)

The Court orders that the motion for leave to file a reply brief is GRANTED.

The application for leave to appeal is DENIED for lack of merit in the grounds presented.

A true copy entered and certified by Carl L. Gromek, Chief Clerk, on Aug 05, 1998.

/s/_____
Chief Clerk

APPENDIX C

STATE OF MICHIGAN
IN THE SIXTH JUDICIAL CIRCUIT COURT
OAKLAND COUNTY

[filed December 22, 1997]

C & C BUILDING CO. INC.,	)
a Michigan corporation,	)
JOHN C. CHARNAS,	)
COSTA J. CHARNAS,	)
Petitioners (Appellant),	)
	)
v.	)
	)
STATE OF MICHIGAN., DEPT.	)
OF CONSUMER INDUSTRY	)
AFFAIRS (SIC-DEPARTMENT	)
OF CONSUMER AND	)
INDUSTRY SERVICES),	)
BUREAU OF OCCUPATIONAL	)
AND PROFESSIONAL	)
REGULATION (BOPR),	)
(N/K/A OFFICE OF	)
COMMERCIAL SERVICES),	)
Respondent (Appellee).	)
	)

EILEEN CHARNAS (P35076)
Attorney for Petitioner
2674 Ennishore
Novi, MI 48375
(410) 348-9663

DONALD E. QUICK (P19153)
Assistant Attorney General, Attorney for Respondent
Michigan Plaza Building
Sixth Street
Detroit, MI 48226
(313) 256-3075

ORDER AFFIRMING ADMINISTRATIVE HEARING DECISION

At a session of said Court held in the courthouse in the City of Pontiac, County of Oakland, State of Michigan, on January 5, 1998.

/s/_____
Deborah G. Tyner
Circuit Court Judge

This matter came before this Court on Petitioners C & C Building Co., Inc., John C. Charnas and Costa J. Charnas' appeal of Michigan Department of Consumer and Industry Services, Residential Builders and Maintenance and Alteration Contractors Board's February 20th, 1997 Final Order. The administrative hearing record and transcripts for the hearing were filed with and reviewed by this Court. The parties filed

briefs with this Court, and oral argument was heard on December 17, 1997. After having fully considered this matter, this Court finds that the Final Order of the Residential Builders and Maintenance and Alteration Contractors Board is supported by competent, material and substantial evidence upon the record, and is otherwise legally correct. Therefore, this Court orders as follows:

IT IS HEREBY ORDERED that Petitioners, C & C Building Co., Inc., John C. Charnas and Costa J. Charnas' appeal is denied for the reasons set forth upon the record on December 17, 1997, and the Final Order of the Residential Builders and Maintenance and Alteration Contractors, Board is affirmed.

/s/_____
Deborah G. Tyner
Circuit Court Judge

DRAFTED BY:
Ronald E. Quick (P19153)
Assistant Attorney General
Attorney for Respondent MDCIS
Sixth Street, Suite 1740 Detroit,
MI 48226
(313) 256-SO75

APPENDIX D

MICHIGAN SUPREME COURT
LANSING, MICHIGAN

[filed June 29, 1999]

Elizabeth A. Weaver,
Chief Justice
James H. Brickley
Michael F. Cavanagh
Marilyn Kelly
Clifford W. Taylor
Maura D. Corrigan
Robert P. Young, Jr.
Justices

112920 (18)

C & C BUILDING CO. INC, C.J., CHARNAS, and J.C. CHARNAS, Plaintiffs-Appellants,	)	
	)	SC: 112920
	)	COA: 209060
v.	)	Oakland CC: 97-541257-AA
STATE OF MICHIGAN, DEPARTMENT OF CONSUMER AFFAIRS, INDUSTRY AFFAIRS, BUREAU OF OCCUPATIONAL AND	)	

PROFESSIONAL)
REGULATION,)
Defendant-Appellee.)
_____)

On order of the Court, the motion for reconsideration of this Court's order of April 27, 1999 is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

C0622

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 29, 1999

/s/_____
Corbin R. Davis

APPENDIX E

STATE OF MICHIGAN
DEPARTMENT OF CONSUMER
AND INDUSTRY SERVICES

[filed February 20, 1997]

IN THE MATTER OF:	)	Docket No. 95-1162
	)	Complaint No. 21-93-
	)	0494-01
JOHN COSTA CHARNAS	)	
License No. 21-01-083666	)	
	)	
22674 Ennishore Drive	)	
Novi, Michigan 48375	)	
	)	

FINAL ORDER

WHEREAS, this matter having come before the Residential Builders and Maintenance and Alteration Contractors Board on December 10, 1996; and

WHEREAS, the Board having considered the Findings of Fact and Conclusions of Law in the Hearing Report of Stephen B. Goldstein, Administrative Law Judge, dated November 6, 1996; and

WHEREAS, the Board, having accepted the Hearing

Report, and JOHN COSTA CHARNAS, License No. 2101-083666, hereinafter "Respondent", having been found in violation of Section 604(c) and 2411(2)(m) of 1980 PA 299, as amended, hereinafter "Code"; and

WHEREAS, the Hearing Report being hereby incorporated by reference:

IT IS HEREBY ORDERED that the following penalties authorized by Section 602 of the Code are hereby imposed:

1. That Respondent shall pay a FINE in the amount of $500, said FINE to be paid to the Department of Consumer and Industry Services within sixty (60) days from the mailing of this Order.

2. That Respondent shall be issued a LETTER OF CENSURE by the Residential Builders and Maintenance and Alteration Contractors Board expressing its dissatisfaction with the violations established in this matter.

3. That failure to comply with the provisions of this Order as set forth in Paragraph 1 above shall result in the suspension of any and all licenses held by Respondent and/or in the denial of any license renewal application until such time as compliance has been shown.

This Order shall not be construed as limiting the Department of Consumer and Industry Services, any other agency of the State of Michigan, or any individual as to the use of a lawful method of collection of the fine imposed by this Order.

Failure to comply with the provisions of this Order is a violation of the Code pursuant to Section 602 and may result in further disciplinary action.

This Final Order is effective immediately upon its mailing.

Given under my hand at Lansing, Michigan, this 20th day of February, 1997.

RESIDENTIAL BUILDERS & MAINTENANCE & ALTERATION CONTRACTORS BOARD

By:

/s/_____
Chairperson

Date mailed: 2-20-97

Proof of Compliance Should Be Filed With:

Department of Consumer and Industry Services Legal Drafting and Compliance Section
P.O. Box 30189
Lansing, MI 48909

STATE OF MICHIGAN
DEPARTMENT OF CONSUMER
AND INDUSTRY SERVICES

[filed February 20, 1997]

IN THE MATTER OF:	)	Docket No. 95-1162
	)	Complaint No. 21-93-
	)	0494-01
JOHN COSTA CHARNAS	)	
License No. 21-01-083666	)	
	)	
22674 Ennishore Drive	)	
Novi, Michigan 48375	)	
	)	

FINAL ORDER

WHEREAS, this matter having come before the Residential Builders and Maintenance and Alteration Contractors Board on December 10, 1996; and

WHEREAS, the Board having considered the Findings of Fact and Conclusions of Law in the Hearing Report of Stephen B. Goldstein, Administrative Law Judge, dated November 6, 1996; and

WHEREAS, the Board, having accepted the Hearing Report, and COSTA J. CHARNAS, License No. 21-01-066656; and C and C BUILDING COMPANY, COSTA J. CHARNAS, License No. 21-02-113074, hereinafter

"Respondent", having been found in violation of Sections 604(c) and 2411(2)(m) of 1980 PA 299, as amended, hereinafter "Code", and Rule 21(3) of the rules promulgated thereunder; and

WHEREAS, the Hearing Report being hereby incorporated by reference:

IT IS HEREBY ORDERED that the following penalties authorized by Section 602 of the Code are hereby imposed:

1. That Respondent shall pay a FINE in the amount of $500, said FINE to be paid to the Department of Consumer and Industry Services within sixty (60) days from the mailing of this Order.

2. That Respondent shall be issued a LETTER OF CENSURE by the Residential Builders and Maintenance and Alteration Contractors Board expressing its dissatisfaction with the violations established in this matter.

3. That failure to comply with the provisions of this Order as set forth in Paragraph 1 above shall result in the suspension of any and all licenses held by Respondent and/or in the denial of any license renewal application until such time as compliance has been shown.

This Order shall not be construed as limiting the Department of Consumer and Industry Services, any other agency of the State of Michigan, or any individual as to the use of a lawful method of collection of the fine imposed by this Order.

Failure to comply with the provisions of this Order is a violation of the Code pursuant to Section 602 and may result in further disciplinary action.

This Final Order is effective immediately upon its mailing.

Given under my hand at Lansing, Michigan, this 20th day of February, 1997.

RESIDENTIAL BUILDERS & ALTERATION
CONTRACTORS BOARD

By: /s/_____
Chairperson

Date mailed 2-20-97

Proof of Compliance Should Be Filed With:

Department of Consumer and Industry Services
Legal Drafting and Compliance Section
P.O. Box 30189
Lansing, MI 48909

APPENDIX F

STATE OF MICHIGAN
DEPARTMENT OF CONSUMER
AND INDUSTRY SERVICES
BUREAU OF OCCUPATIONAL AND
PROFESSIONAL REGULATION
OFFICE OF LEGAL SERVICES
HEARINGS DIVISION

[filed November 6, 1996]

IN THE MATTER OF:	)	Docket No. 95-1162
	)	Complaint No. 21-93-
	)	0494-01
JOHN COSTA CHARNAS	)	
	)	

Issued and entered
this 6th day of November 1996
by
STEPHEN B. GOLDSTEIN
ADMINISTRATIVE LAW JUDGE

HEARING REPORT

This matter was duly scheduled for a contested case hearing to commence on September 27, 1996 at 9:00 A.M. in the hearing rooms of the Michigan Department of Consumer and Industry Services, Bureau of Occupational and Professional Regulation, Office of Legal Services, Hearings

Professional Regulation, Office of Legal Services, Hearings Division, 611 W. Ottawa St., Lansing, Michigan.

Stephen B. Goldstein presided as Administrative Law Judge.

APPEARANCES:

John Valenti, Attorney at Law, appeared on behalf of the State of Michigan (State).

Eileen Charnas, Attorney at Law, appeared on behalf of John Costa Charnas (Respondent).

SUMMARY OF PROCEEDING:

This matter commenced with the filing by the State of a Formal Complaint (Complaint) dated March 7, 1995 alleging violations by Respondent of Michigan's Occupational Code, 1980 PA 299, as amended (Code).

A Notice of Hearing dated January 10, 1996 was issued and entered scheduling this matter to commence at 9:00 A.M. on March 1, 1996.

On or about February 10, 1996, Respondent requested an adjournment of the March 1, 1996 hearing date. By memorandum dated February 12, 1996, the State objected to Respondent's request for an adjournment of the March 1, 1996 hearing.

On February 14, 1996, this Judge issued and entered an Order for First Adjournment, thereby rescheduling this

matter to commence at 1:30 P.M. on Friday, March 15, 1996.

On or about February 20, 1996, Respondent filed a Motion for Summary Disposition On or about February 23, 1996, the State filed its Response to Motion for Summary Disposition.

On February 23, 1996, an Order for Second Adjournment was issued and entered for administrative purposes rescheduling this matter to commence at 9:00 A.M. on Friday, May 24, 1996.

On March 21, 1996, an Order Adjourning Hearing and Scheduling Oral Argument was issued and entered converting the May 24, 1996 contested case hearing date into a hearing to entertain oral argument on Respondents Motion for Summary Disposition.

On June 5, 1996, following oral argument on Respondents Motion for Summary Disposition, an Order Denying Motion for Summary Disposition and Order Scheduling Hearing was issued and entered. The new hearing date was set for 9:00 A.M. on Wednesday, September 4, 1996.

On September 4, 1996, counsel for the State appeared, however, neither Respondent nor counsel on his behalf appeared at the hearing. After some investigation, it was discovered that both Respondent and his counsel has mistaken this Judge's order for adjournment of the September 4, 1996 hearing in another case involving the same Respondent for the present matter. Having considered this mistake justified and understandable, this Judge issued and entered an Order for

Continuation dated September 10, 1996, rescheduling this matter to commence at 9:00 A.M. on September 27, 1996 at which time the hearing proceeded as scheduled.

SUMMARY OF EXHIBITS

State Exhibit 1 is a copy of a Application for Plan Examination and Building Permit signed by C.J. Charnas on March 28, 1990.

State Exhibit 2 is a copy of a Building Permit issued by the City of Novi, Michigan on April 18, 1990 to C & C Building Company.

State Exhibit 3 is a copy of a Certificate of Occupancy and Compliance concerning Lot 35, Deerbrook Subdivision, commonly known as 41429 Reindeer Dr., dated October 23, 1991.

State Exhibit 4 is a copy of a Building Inspection Report completed by Gerry McCallum, Building Inspector, City of Novi, Oakland County, Michigan, dated May 12, 1993.

State Exhibit 5 is a copy of a letter from Brian and Lula Swanson (Complainants) to Respondent dated March 27, 1993 containing a list of items Complainants believed to be problems with their home.

State Exhibit 6 is a copy of a front page of the Statement of Complaint filed by Complainants against

Respondent dated April 22, 1993.

State Exhibit 7 is a copy of a Michigan Department of Commerce Certificate of Licensure, dated October 19, 1993. The Certificate indicates that C & C Building Company, Costa J. Charnas, Qualifying Officer, was not licensed as a Corporation Residential Builder for the specific period March 3, 1990 through May 10, 1993.

State Exhibit 8 is a copy of a 1990 Michigan Annual Report-Profit Corporations, dated May 14, 1990, and filed by C & C Building Company, Inc., by Costa J. Charnas, its President.

State Exhibit 9 is a copy of a Warranty Deed given by Respondent to Complainants with regard to the subject matter property, and dated October 25, 1991.

State Exhibit 10 is a copy of an Offer to Purchase Real Estate signed by both Complainants and Respondent on September 16, 1991.

Respondent Exhibit A is a copy of a copy of a document entitled, "Statement of Nonwarrantable Conditions.

Respondent Exhibit B is a copy of a multi-page document entitled, "Limited Warranty Program."

Respondent Exhibit C is a copy of a letter from Eileen Charnas, Attorney at Law, to Mr. and Mrs. Bruce Swanson dated April 12, 1993.

Respondent Exhibit D is a copy of a Settlement Agreement and Dismissal of Complaint executed by and between Complainants and Respondent on September 1, 1995.

Respondent Exhibit E is a copy of a letter from Complainants to Jeanette W. Eiserman, Department Analyst, dated September 12, 1995.

Respondent Exhibit F is a copy of the same document described as State Exhibit 5.

Respondent Exhibit G is a copy of an unsigned letter from Complainants to Jeanette W. Eiserman, Department Analyst, dated July 10, 1995.

Respondent Exhibit H is a copy of a Brief filed by Respondent with the Michigan Court of Appeals in Docket No. 177312, **Costa J. Charnas and C & C Building Company** v **State of Michigan Department of Commerce**, dated September 6, 1994.

Respondent Exhibit I is a copy of a Reply Brief filed by Respondent with the Michigan Court of Appeals in Docket No. 177312, **Costa J. Charnas and C & C Building Company** v **State of Michigan Department of Commerce**, dated October 21, 1994.

Respondent Exhibit J is an unused soffit vent offered to demonstrate what a soffit vent looks like.

ISSUES AND APPLICABLE LAW:

The general issue presented in this matter is whether Respondent violated the Code as alleged by the State in its Complaint.

The specific issues are whether Respondent has violated Sections 604(c) and Section 2411 (2)(m) of the Code, and AC R 338.1551 (4) of the Residential Builders and Maintenance and Alteration Contractors Board Rules (Rules). Those Sections of the Code and Rules provide as follows:

> **"Sec. 604. A person who violates 1 or more of the provisions of an article which regulates an occupation or who commits 1 or more of the following shall be subject to the penalties prescribed in section 602:**
>
> " ***"
>
> "(c) Violates a rule of conduct in practicing an occupation."
>
> " * * *"
>
> Sec. 2411. (1) * * *"
>
> "(2) A licensee or applicant who commits I or more of the following shall be subject to the penalties set forth in article 6:"
>
> "(m) Poor workmanship or workmanship not meeting the standards of the custom or trade verified by a

building code enforcement official."

Rule 51. (1) * * *"

"(4) If a complaint is justified by the local building inspector or by a person authorized by the department to make inspections, the builder or contractor shall correct the complaint within a reasonable time. Failure or refusal by the licensee to correct a structural matter that is materially deficient, dangerous or hazardous to the owners shall be presumed to be dishonest or unfair dealing."

" * * * "

FINDINGS OF FACT:

It is largely undisputed that on or about September 16, 1991, Respondent, operating as C & C Building Company, entered into a contract for the construction of a new residential dwelling with Brian and Speredoula Swanson (hereafter Complainants).

Gerry A. McCallum testified on behalf of the State at the September 27, 1996 hearing that he has been a City of Novi, Michigan Building Inspector for the past 6 years, and that prior to obtaining his present position, was a licensed builder. Mr. McCallum indicated he has a Bachelor's Degree from Lawrence Technological University and an Associates Degree in Construction Engineering. He further indicated he is a certified plan examiner.

Mr. McCallum testified that he conducted an inspection of Complainant's home on May 12, 1993 and drafted an inspection report in response to his findings. (State Exhibit 4).

He testified with regard to State Exhibit 4 as follows:

ITEM #1 - Drywall was cracked on both the first and second floor walls and ceilings. He indicated the cracks were too numerous to count, and for this problem, he found a workmanship violation.

ITEM #2 - The fireplace mortar was cracked in the rear portion of the firebox. He indicated this was possibly due to shrinkage of the grout that could be repaired by filling the 1/8 to 1/4 inch crack with additional mortar. He cited Respondent for a workmanship violation based on what he believed to be improper installation by Respondent.

ITEM #3 - With regard to the driveway, there were shrinkage cracks In the flags or sections where there are control joints. He also noticed excessive spalling, deterioration, chips and deformities in the driveway surface. He acknowledges, however, that he posseses no specialty certifications in concrete installation, but rather has had some training in such installation.

ITEM #4 - With regard to the kitchen and dining room windows, states that the caulking is not properly adhered to windows themselves at trim areas.

ITEM #5 - With regard to the soffit vents on the north side of the roof, states there were six (6) nails, one in each corner and one in the middle. He thought there was perhaps 1 nail missing along with louvers which were also missing.

ITEM #6 - States there was paint peeling on the stucoto board along the exterior of the west wall of the home. He indicates that properly applied paint is essential to weather protection, and that the affected area could have been scraped down and repainted.

ITEM #7 - States that the rough sawn trim board above the kitchen window was cut unevenly, leaving a large gap at the bottom of the board. He would categorize this as a cosmetic item which would require total replacement of the board itself.

ITEM #8 - With regard to mortar separation, states that this may be due to mortar shrinkage, which in turn is leaving a large number of gaps between the brick and mortar itself.

ITEM #9 - States there is a gap at the southwest corner of the home where a large corner piece of the foundation appears to be missing. He indicated that repairing this problem might require filling the foundation with cement or concrete, not mortar. He indicates this is weather protection problem.

ITEM #10 - States garage floor has cracks due to what he thinks is the lack of control joints. He states, however, that although recommended, control joints

are not needed in order to pass inspection. He further states that the cracks are 3/16 of an inch or less from the front of the garage to the rear of the garage.

ITEM #11- States trim around bedroom window was not flush with the wall, and that because the window had already been installed into the wall, it would have to be completely removed and reinstalled in order to repair the problem.

ITEM #12 - States there was excessive grout shrinkage concerning the foyer tile, hall closet, basement stairs and library entrance.

ITEM #13 - States there a spot of varnish stain present in the grout between the foyer tile which although a cosmetic problem, cited the Respondent because it shouldn't have been there in the first place.

ITEM #14 - States the front door jamb was not plumb with the door, causing gaps between the door and frame which might result in a small amount of air infiltration from the outside.

ITEM #15 - States that the loose and cracked tile could be a result of the grout shrinkage problem.

ITEM #16 - States that the window plaster roller damage occurred while the Complainants occupied the home and opined that the damage could have been inflicted by them.

ITEM #17 - States the library french doors were scratched and that such scratches could have been inflicted by Complainants. He also opined that the Respondent could have scratched the doors while cleaning them prior to the final inspection.

ITEM #18 - States the backsplash lining the countertops were separating from the wall, which in his opinion is the result of an inadequate caulking job by Respondent when the counters were installed. He states this is a high moisture area which needs to be sealed properly.

ITEM #19 - See testimony contained under Item #18.

ITEM #20 - States the subfloor feels loose in the center of the master bedroom floor and northeast corner of the library. He says he didn't inspect the floor to see why it was squeaking but suspects that part of the problem may be that the duct was to close to the subfloor and that it was the duct that was squeaking and not the floor itself.

On cross examination, Inspector McCallum acknowledged that nail pops normally occur, however, in this case, there were too many to count. With regard to drywall repairs, Inspector McCallum opined that it is trade practice for a builder to return to a home to make such repairs within the 18-month period, however, he could not say whether such practice was also a BOCA Code requirement.

Concerning the cracked rear wall in the fireplace, Inspector McCallum acknowledge, that heat from any number

of fires could have caused the crack in the rear firewall. He also stated he was not made aware by the Complainants that Respondent was in the process of fixing the problem with the fireplace when he made his inspection.

With regard to the driveway issue, Inspector McCallum testified he is not aware whether there are or are not standards for driveway appearance. He indicated he based his findings and violations upon the "standards of the industry", however, he could not specify what standards of the industry he was relying upon. Inspector McCallum stated his conclusions of workmanship violations were based upon his own personal experience as a builder.

Upon further questioning about the driveway appearance issue, Inspector McCallum admitted that he could have noticed that the driveway was partly broomed and/or trowled at the time of the final inspection, and in fact admits he noticed it but did not cite him for it. Inspector McCallum could provide no specific explanation as to why he didn't cite Respondent for the driveway problem at the final inspection.

With regard to the caulking issue, Inspector McCallum testified that it caulk is installed properly, it will last longer than 18 months. He acknowledged, however, that the caulk concerning Complainant's home was installed long before the Complainants took possession of the home because this particular home was a "model" or "spec" home.

With regard to the missing nail on the soffit vent, Inspector McCallum acknowledged that some other condition probably caused the nail to fall out, and couldn't specifically hold Respondent responsible for this problem.

With regard to the varnish stain on the foyer tile, Inspector McCallum acknowledged that the stain could have occurred at almost any time and could have even been caused by Complainant.

With regard to the front door jamb out of plumb issue, Inspector McCallum stated he noticed or could have noticed this problem at the time of the inspection but failed to bring it the Respondent's attention. With regard to the loose and cracked tile issue, Inspector McCallum stated he could not remember how many tiles were loose and/or cracked and further stated he didn't notice this problem at the time of the final inspection.

With regard to the damaged roller on the window issue, Inspector McCallum acknowledged that the roller could have been damaged in shipment from the manufacturer or that it could have been a manufacturer's defect which he conceded would not be the fault of a builder.

With regard to the scratched glass on the library french doors, Inspector McCallum acknowledged that the scratch could have been a manufacturer's defect, or could have been caused by Complainants or Respondent. He could not specifically hold Respondent liable for this problem.

With regard to the kitchen backsplash caulking problem, Inspector McCallum acknowledged that some separation of the caulking from the surface is common. With regard to the squeaking floor issue, Inspector McCallum stated that it was moderately noticeable and acknowledged that floor squeaks will appear and disappear over time with changes in weather conditions.

Respondent testified that he made repairs to Complainant's home numerous times during a four (4) year period following issuance of the Certificate of Occupancy. He stated he has performing re-caulking, fixed nail pops 3 times, has done mortar work, removed rocks from the front yard, installed base molding in the garage, re-caulked the backsplashes, and did touch-up paint on exterior surfaces.

Respondent indicated that many of the items listed on Inspector McCallum's inspection report were completed and that his problems with Complainants were settled pursuant to a settlement agreement. He further indicated that he and his crew continued to make repairs to the Complainant's home in an effort to accommodate them even after the Complainants had filed their complaint with the State.

Complainants did not appear at the hearing nor were they called by the State as witnesses in this case.

CONCLUSIONS OF LAW:

The principles that govern judicial proceedings also apply to administrative proceedings. 8 Callaghan's Michigan Pleading and Practice, 2nd Ed, Section 60.48, p. 280.

The burden of proof is upon the State to prove, by a preponderance of the evidence that Respondent violated the Code. 1990 AACS R 339.1763.

VIOLATION OF SECTION 2411(2)(m) OF THE CODE

By this charge, the State asserts that Respondent's performance on the subject matter contract failed to comply with generally accepted workmanship standards of the industry.

It appears from a review of the entire record in this matter that Respondent has furnished either an explanation for problem items contained in Inspector McCallum's report or has cast doubt on whether Respondent is even responsible for some of those items.

However, Respondent has not established any justification or excuse for items 7, 9 and 11 of Inspector McCallum's report, those being the unevenly cut rough sawn trim board in the kitchen, the gap at the southwest corner of Complainant's home where the evidence established missing foundation, or the bedroom trim around the window. No explanation was furnished by Respondent as to why these problems existed or whether some other factor could have contributed to the problem. On those particular items, a workmanship violation is found on this record as a whole. Crooked trim work, missing foundation and the like are easily identified as lacking quality workmanship. However, as to the remaining items contained in Inspector McCallum's report, the State has failed to establish that Respondent is solely responsible for those problems, or that some objective as opposed to Inspector McCallum's subjective workmanship standard would render Respondent guilty of a workmanship violation. In this Judge's opinion, these types of problems are not as easily identified as lacking quality workmanship.

Accordingly, the State has established, by a preponderance of the evidence, that with regard to Items 7, 9 and 11 of Inspector McCallum's inspection report, Respondent violated Section 2411 (2)(m) of the Code as alleged.

VIOLATION OF 1979 AC R 338.1551 (4)

By this charge, the State asserts that the items contained in Inspector McCallum's inspection report were not corrected within a reasonable time, contrary to Rule 51 (4).

The evidence presented appears to indicate that most, if not all of the items contained in the inspection report were in fact corrected by Respondent after Respondent was made aware of such items. Inspector McCallum's testimony that he failed to point out to Respondent some of the items he knew about during the final inspection leads this Judge to believe that Respondent only found about these items after the inspection supporting Complaint was filed. To hold Respondent accountable for items which he knew nothing about is unfair and not contemplated by the Code.

Accordingly, the State has failed to establish, by a preponderance of the evidence, that Respondent violated AC R 338.1551 (4).

VIOLATION OF SECTION 604(c) OF THE CODE

By this charge, the State asserts that Respondent has violated a rule of conduct in practicing his occupation as a builder.

Because of the violations found under Section 2411 (2)(m) of the Code, a violation of this section is also found on this record as a whole.

Accordingly, the State has established, by a preponderance of the evidence, that Respondent has violated Section 604(c) of the Code.

SUMMARY

The State has established, by a preponderance of the evidence, that Respondent has violated Section 2411 (2)(m) and Section 604(c) of the Code.

NOW THEREFORE IT IS HEREBY ORDERED THAT:

1. Respondent shall be assessed a penalty and/or fine as provided for under Section 602 of the Code.

Jurisdiction of the matters contained herein are specifically retained together with the authority to issue such further order or orders as may be deemed just, necessary and appropriate.

/s/ _____
STEPHEN B. GOLDSTEIN
ADMINISTRATIVE LAW JUDGE

PROOF OF SERVICE

I hereby certify, to the best of my knowledge, information and belief, that a copy of the foregoing documents were served upon all parties and/or attorneys of record in this matter by mailing same to them at their respective addresses as disclosed by the file, with postage fully prepaid on the 6th day of November 1996.

/s/ _____
Maraloy D. Thomas
Office of Legal Services

Eileen Charnas, Attorney at Law
22674 Ennishore Dr.
Novi, Michigan 48375

a copy was mailed ID mail to:

James Montgomery
BOPR, Office of Commercial Services

APPENDIX G

STATE OF MICHIGAN
COURT OF APPEALS

Unpublished June 4, 1996

COSTA I. CHARNAS and C & C BUILDING CO., INC., Plaintiffs-Appellants,	)	
v.	)	No. 177312
	)	LC No. 94-473333-AA
DEPARTMENT OF COMMERCE and CITY OF NOVI, Defendants-Appellees.	)	

Before: Murphy, P.J., and Markman and Karl V. Fink,*JJ.*

PER CURIAM.

Plaintiffs appeal by right an order dismissing plaintiffs' complaint for declaratory judgment. We affirm.

Pursuant to a contract, plaintiffs constructed a home

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*Circuit judge sitting on the Court of Appeals by assignment.

that passed all inspections and for which a certificate of occupancy was issued. The homeowner reported plaintiffs to the Michigan Bureau of Occupational and Professional Regulation. An inspector issued a report listing fourteen specific verified items. Thirteen were listed as violating workmanship standards as well as section 116.0 of the 1987 Building Officials and Code Administrators (BOCA) Code.

Plaintiffs commenced the present action, seeking a declaratory judgment that a portion of the statute governing construction violation complaints, MCL 339.2411(2)(m); MSA 18.425(2411)(2)(m) and BOCA code § 116.0, both of which use the term "workmanship", were unconstitutionally vague. They alleged that these provisions did not notify plaintiffs what constituted a valid complaint regarding "workmanship", failed to provide sufficient notice of the standards to which plaintiffs would be held, did not consider wear and tear by occupants, did not establish adequate guidelines for the building department and its agents and that these provisions, as applied to plaintiffs, resulted in an arbitrary and unreasonable exercise of the police power.

The trial court heard the parties' arguments and denied plaintiffs' complaint for declaratory relief. It held:

> Regarding the vagueness of MCL 339.2411(2)(m), the issue presented is whether the phrase, "nonworkmanship," as a means of regulating residential builders, is unconstitutionally vague.

* Circuit judge sitting on the Court of Appeals by assignment.

Statutory language must be sufficiently clear and definite to prove fair warning of proscribed conduct. Statutes which do not involve first amendment freedoms must be examined in light of the facts of the case at hand. . .

In review of the pleadings in this case, plaintiffs' own contract[2], and the facts of this case, this Court is satisfied that the standard articulated in the statute provides fair warning of proscribed conduct. Thus, plaintiffs' argument regarding the lack of notice must also fail.

On appeal, plaintiffs claim that the trial court erred in denying their motion for declaratory judgment. They contend that the application of § 2411(2)(m) to them was unconstitutionally vague.[3] They do not seek to strike down the statute but rather object to its unreasonable operation in the present case.

This Court reviews declaratory judgments de novo, but will not reverse a trial court's factual findings unless they are clearly erroneous. *Michigan Residential Care Ass'n v. Dep't of Social Services,* 207 Mich App. 373, 375; 526 NW 2d 9 (1994). A challenge to the constitutionality of tho statute is a legal question that this Court reviews do novo. *Monroe Beverage Co, Inc. v. Stroh Brewery Co,* 211 Mich App. 286, 295; *535* NW 2D 253 (1995). A party challenging the constitutionality of a statute bears the heavy burden of overcoming the presumption that statutes are constitutional. *Gorney v. Madison Heights,* 211 Mich App. 265, 267; *535* NW 2D 263 (1995).

In *Michigan State AFL-CIO v. Civil Service Comm (After Remand)*, 208 Mich App. 479, 492; 528 NW 2D 811

(1995), this Court cited *Woll v. Attorney* General, 409 Mich 500, 533; 297 NW 2D 578 (1980) as enunciating the standard for vagueness:

> A statute may be challenged for vagueness on the grounds that it
>
> -- is overbroad, impinging on First Amendment freedoms, or
>
> -- does not provide fair notice of the conduct proscribed, or
>
> -- is so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether an offense has been committed.

"Vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand." *Petrus v. Dickinson Co Comm'rs, 184 Mich* App. 282, 300-301; 457 NW 2D 359 (1990), citing *People v. Lynch,* 410 Mich 343, 352; 301 NW 2D 796 (1981). Here, plaintiffs' challenge to the constitutionality of § 2411(2)(m) does not involve First Amendment rights; thus, we will consider it in the context of the specific, facts at hand.

> Section 2411(2)(m) states:
>
> A licensee or applicant who commits 1 or more of the following shall be subject to the penalties set forth in article 6:

> (m) Poor workmanship or workmanship not meeting the standards of the custom or trade verified by a building code enforcement official.

1979 AC, R 338.1551(5) states:

> Standards of construction shall be in accordance with the local building code, or in the absence of a code in accordance with the building code of the nearest political subdivision having a building code.

According to plaintiffs, the relevant local building code is the BOCA code as adopted by Novi city ordinance 7-16. BOCA code 116.0 is simply a heading entitled, "Workmanship." BOCA code 116.1 states:

> All work shall be conducted, installed and completed in a workmanlike manner so as to secure the results intended by this code.

Plaintiffs contend that the term "workmanship' in the statute and building code is unconstitutionally vague. In support, they cite the 1993 commentary to the BOCA code, which addressed former 115.0 and 115.1 (which are identical to present 116.0 and 116.1). The commentary states:

> [Section 115.0] is a traditional statement of intent, and should be regarded and used solely in this manner.
>
> Alone, [115.1] is difficult to enforce as it is difficult to prescribe workmanship criteria for

> all conditions. As a clear statement of intent, however, this section can be cited effectively in conjunction with a specific referenced standard, code text or manufacturer's installation instructions.

Here, in eleven of the fourteen items, the inspector cited BOCA code § 116.0 alone, rather than in conjunction with another specific standard. However, the building inspection report form requires descriptions of the specific items in violation. Here, the inspector's descriptions of the fourteen items themselves are detailed. In plaintiffs' December 1993 supplemental answer to formal complaint, they specifically responded to each of the items. They denied that the alleged conditions resulted from poor workmanship and supported their denials with specific allegations as to the cause of each of the alleged conditions. The detailed inspection report and plaintiffs' detailed response indicate that here, plaintiffs had fair notice of what constitutes poor "workmanship" under § 2411(2)(m). We also note that in their contract with the homeowner, plaintiffs agreed to remedy any defects in "workmanship." On the basis of this evidence, we find that plaintiffs understood the meaning of the term "workmanship" and that this term did not confer unlimited discretion on the trier of fact to determine whether plaintiffs had violated § 2411(2)(m). Accordingly, plaintiffs fail to demonstrate that the statute, as applied to them, through the inspector's report citing BOCA code 116.0 was unconstitutionally vague.

Affirmed.

/s/_____
William B. Murphy

/s/_____
Stephen J. Markman

/s/_____
Karl V. Fink

1. The lower court file indicates that two homeowners reported plaintiffs to the Bureau. However, on appeal, all parties focus on the report of only one homeowner.

2. Plaintiffs' contract with the homeowner included a provision that plaintiffs agreed to "remedy any defects in workmanship which appear .... "

3. In their appellate brief, plaintiffs emphasize that the trial court considered only § 2411(2)(m) and failed to address their vagueness challenge regarding BOCA code § 116.0.

APPENDIX H

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF OAKLAND

[filed July 12, 1994]

COSTA J. CHARNAS and	)
C & C BUILDING CO., INC.,	)
a Michigan corporation,	)
Plaintiffs,	)
	)
v.	)
	)
STATE OF MICHIGAN	)
DEPARTMENT OF COMMERCE	)
BUREAU OF OCCUPATIONAL	)
AND PROFESSIONAL	)
REGULATIONS and CITY OF	)
NOVI	)
Defendants.	)
	)

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ORDER OF DISMISSAL

At a session of said Court, held in the Courthouse, City of Pontiac, County of Oakland, State of Michigan on July 7, 1994.

PRESENT:
HONORABLE /s/_____
Fred M. Mester

The matter having come before the Court on Plaintiffs' Complaint for Declaratory Judgment, the parties having filed briefs and having argued the matter in open court, and the Court being fully advised in the premises;

IT IS HEREBY ORDERED that Plaintiffs' Complaint for Declaratory Judgment is denied, and the matter is dismissed, for the reasons stated on the record.

/s/_____
FRED M. MESTER
CIRCUIT COURT JUDGE

Proof of Service: April 17, 1994